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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Joint written statement* submitted by International-Lawyers.Org, the Arab Organization for Human Rights and the Union of Arab Jurists, non-governmental organizations in special consultative status, and International Educational Development, Inc. and the World Peace Council, non-governmental organizations on the roster

The Secretary-General has received the following written statement, which is hereby circulated in accordance with Economic and Social Council resolution 1996/31.

[5 February 2018]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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War Crimes Committed During the War and Occupation of Iraq*

Focus

This statement focuses on violations of international law during the Iraq War and occupation, and in particular, war crimes committed by the United States of America and its allies (hereinafter, the "***Coalition***").[1] The extent of Coalition war crimes warrants the establishment of an independent international tribunal that can investigate and prosecute such crimes.

Background: The Iraq War

In March 2003, the United States, the United Kingdom of Great Britain and Northern Ireland, and other Coalition members illegally invaded the Republic of Iraq and subsequently occupied the country. Despite the official withdrawal of United States forces in December 2011, the consequences of the occupation remain, and the United States continues to dominate Iraqi political affairs.

Human Rights Violations up to and During the Iraq War

Member States comprising the Coalition were and are bound to comply with their obligations under international law, including the four Geneva Conventions of 1949. International humanitarian law applies equally to all parties to an armed conflict, independent of whether the initial use of force was lawful under legal doctrines related to *jus ad bellum*.[2] Persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches.

During the Iraq War, human rights organizations and news outlets reported multiple and overlapping violations of international law, including grave breaches of the Geneva Conventions. These grave breaches were committed by senior members of the Bush administration, military leaders, and individual unit commanders and individual troops.

War Crimes

In an international armed conflict[3] like the initial Iraq War, war crimes include all grave breaches of the Geneva Conventions, including: willful killing, torture or inhuman treatment, unlawful detention, deportation or transfer of a civilian, denying civilians or prisoners of war of fair trial rights, hostage-taking, and wanton destruction of and appropriation of property.[4]

Further, international humanitarian law applies in the whole territory of States involved in the conflict, whether or not actual combat takes place there.

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1 This March marks the 15th year anniversary of the Iraq War.

2 *See* Yoram Dinstein, *Jus in Bello Issues Arising in the Hostilities in Iraq in 2003*, Isr. Y.B. Hum. Rts., vol. 33 at 2 (2003); Wolff Heintschel von Heinegg, *Irak-Krieg und ius in Bello*, Archiv des Völkerrechts, vol. 41, 274 *et seq.* (2003). There can be little dispute that the invasion of Iraq violated *jus ad bellum* principles and amounted to a prohibited act of aggression, constituting a crime against peace.

3 *Prosecutor v. Tadic*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

4 Geneva Convention I, art. 50; Geneva Convention III, art. 130; Geneva Convention IV, art. 147.

Torture

Since May 2004, human rights organizations and news agencies detailed the use of torture at United States-operated detention facilities, including the Abu Ghraib prison. As described in Maj. Gen. Antonio Taguba's investigation report, the torture at Abu Ghraib included various instances of physical abuse, such as punching, slapping, and kicking detainees, arranging naked male detainees in a pile and then jumping on them.[5] The report also detailed a history of sexual abuse and rape at the prison. Many of these acts amount to war crimes.

Mass Killings and Destruction of Civilian Property

Member States of the Coalition directed attacks against the civilian population not taking part in hostilities.[6] For example, Coalition forces attacked residential neighborhoods and hospitals with cluster bombs and tanks, killing hundreds of civilians and largely destroying civilian property. The extent of death and destruction was exacerbated by the use of depleted uranium in bombs and artillery shells. By deliberately targeting civilians that were not taking part in hostilities, or by using weapons indiscriminately, these attacks violated one of the most fundamental rules of the laws of war and amount to grave breaches of the Geneva Conventions.[7]

The Creation of ISIS

The invasion of Iraq and the policies implemented thereafter exacerbated the growth of extremist ideologies in Iraq and facilitated the growth of terror groups in the region.

The provisional Iraqi government (Coalition Provisional Authority) administered by United States proconsul Paul Bremer disbanded the Iraqi army, banned the Ba'ath party and initiated a purge of the government as part of the "de-Baathification" process. These policies left thousands of Sunni soldiers angry and unemployed, weakened the ability of the newly formed army and security forces to counter terror groups and contributed to the number of radical fighters available to join such terror groups. The soldiers who joined radical and terror forces, with their military training, helped professionalize ISIS as a fighting force.

Second, outward U.S. support of a Shiite-dominated government in Iraq marginalized Sunni Iraqis, pushing them towards protest and resistance, and contributing to the emergence of popular support for ISIS.

Third, at the time of withdrawal of the United States in 2011, the U.S. left behind practically non-existent governmental structures, including a weak national army, creating a power vacuum for terror groups to exploit. A hollow Iraqi military quickly collapsed when attacked by ISIS fighters. As ISIS conquered territory, they seized weapons and military equipment left behind by the Iraqi army and financed by the United States.

Accountability

Ignoring Coalition war crimes in Iraq would amount to a loss of accountability under international law. Moreover, the often-criticized bias of international law—holding only poor and non-Western countries liable for international crimes, while ignoring the crimes of Western powers—will be exacerbated if the international community does not prosecute Coalition crimes in Iraq.

All parties to the Geneva Conventions are required to criminalize and prosecute grave breaches. But Coalition governments have largely failed to do so with respect to war crimes committed by their officials and personnel in Iraq.

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5 *The "Taguba Report" On Treatment of Abu Ghraib Prisoners in Iraq*, Article 15-6 Investigation of The 800th Military Police Brigade, http://news.findlaw.com/cnn/docs/iraq/tagubarpt.html.

6 Kamal Ahmed, *Revealed: The Cluster Bombs That Litter Iraq*, THE GUARDIAN (May 31, 2003), https://www.theguardian.com/world/2003/jun/01/iraq.foreignpolicy1.

7 "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited." Additional Protocol I to the Geneva Conventions, art. 51(2).

In particular, the United States has refrained from prosecuting its officials for such crimes. In light of the 2017 United States Court of Appeal judgment in *Saleh v. Bush*, the chance of a domestic prosecution in the United States is practically nonexistent.[8] This further compels the need for a separate and independent international tribunal to investigate and prosecute Coalition crimes.

The International Criminal Court (ICC) is, at present, the only international criminal tribunal that could potentially have jurisdiction over the war crimes committed by American and British officials. Although the ICC is continuing with its investigation into claims that British troops abused and unlawfully killed prisoners after the U.S.-led invasion under the theory of personal (as opposed to territorial) jurisdiction, the ICC's jurisdiction over other potential international crimes in Iraq is limited without proof of involvement of nationals of ICC parties.[9] Since neither the United States nor Iraq are parties to the Rome Statute, an ICC investigation of non-ICC nationals would require a referral by the UN Security Council. Such a referral would likely be prevented by a United States veto.

An independent international tribunal for Iraq would strengthen international humanitarian law, provide victims an opportunity to voice the horrors they witnessed and experienced, would bring justice to the persons responsible for them, and would contribute to restoring and maintaining peace. The international tribunal would apply existing international law to which all parties in the Iraq War are bound, including treaty law and *jus cogens* principles.

Recommendations

- The Human Rights Council should urgently appoint a Special Rapporteur to monitor and report on the human rights situation in Iraq.
- The United Nations should condemn illegal acts of torture and mass killings by member States, including the ones committed in Iraq by the United States and the Coalition.
- The United Nations should urgently endorse an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Iraq during the initial invasion and then the subsequent occupation of Iraq by the United States and other Coalition members;
- The United Nations should create a committee responsible for allocating compensation for damages and losses due to the 2003 invasion and the subsequent occupation, including to victims of the Iraq War.

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*Geneva International Centre for Justice (GICJ) The Arab Lawyers Association- UK The Brussells Tribunal, Euro-Mediterranean Human Rights Monitor, Association of Humanitarian Lawyers (AHL), The Iraqi Commission for Human Rights (ICHR), Association of Human Rights Defenders in Iraq (AHRD), General Federation of Iraqi Women (GFIW), Organisation for Justice & Democracy in Iraq (OJDI), The Iraqi Centre for Human Rights, International Anti-Occupation Network (IAON), NGOs without consultative status, also share the views expressed in this statement.

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8 In *Saleh v. Bush*, the United States Ninth Circuit Court of Appeal found that a domestic statute granting government leaders "official-act" immunity had greater weight than international treaties and customary international law that ban aggression, even though the norm against aggression is a nonderogable *jus cogens* norm. *Saleh v. Bush*, 848 F.3d 880, 890 (9th Cir. 2017).

9 Owen Bowcott, *The Hague Says Claims of War Crimes by UK Troops Have 'Reasonable Basis'*, THE GUARDIAN (Dec. 4, 2017), https://www.theguardian.com/law/2017/dec/04/icc-to-continue-investigation-into-claims-of-war-crimes-by-british-troops.